BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCISCO ONTIVEROS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,372
WILDCAT CONSTRUCTION COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the February 21, 2012 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes (ALJ).

ISSUES

In a December 10, 2010, preliminary hearing order, claimant was denied benefits after the ALJ determined that claimant had failed to provide respondent with timely notice of accident and claimant failed to establish just cause for that failure sufficient to enlarge the notice period to 75 days.

The order was appealed to the Board and it was found that the date of accident, pursuant to K.S.A. 2009 Supp. 44-508(d), had not been determined. Therefore, the number of days from the date of accident until the date that claimant provided written notice to respondent of the alleged accident could not be determined. The matter was reversed and remanded to the ALJ to determine issues including, but not limited to, the appropriate date of accident and the timeliness of claimant's notice of accident.

The ALJ found, on remand from the Board, that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent in a series of repetitive injuries through his last day worked on May 21, 2010, which was also determined by the ALJ to be the date of accident. The ALJ then found that claimant failed to give oral or written notice of his injuries within 10 days of the accident. Respondent claims that notice was not received until June 28, 2010 when it received a letter from

claimant's attorney. Based upon that date of accident determination, the ALJ denied claimant's request for authorized medical treatment for failing to provide proper notice and for failure to establish just cause for enlargement of the notice period to 75 days.

The claimant appealed that February 21, 2012 Order to the Board arguing that there was proper notice with a date of accident of June 28, 2010, and therefore the ALJ's Order should be reversed. Claimant contends that because he was never provided an authorized physician to take him off work or restrict his activity, the first two criteria of K.S.A. 2009 Supp. 44-508(d) have not been met and the date of accident should be the earliest of (1) the date claimant gave respondent written notice of his injury, or (2) the date claimant's condition is diagnosed as work-related, if that information is communicated to claimant in writing. Respondent acknowledges that it received written notice of claimant's alleged accident on June 28, 2010.

Respondent argues that the ALJ's Order should be affirmed.

ISSUES

1. What is the date of accident in this matter? Claimant contends the date of accident is controlled by K.S.A. 2009 Supp. 44-508(d). Respondent contends the recent Supreme Court case of *Mitchell*[1] restricts K.S.A. 2009 Supp. 44-508(d) to no later than the last day worked.

2. Did claimant provide timely notice of his alleged accident? Claimant alleges he told Harold Katz, Jr., respondent's project supervisor, of his developing right upper extremity problems. Mr. Katz denies knowing of any physical problems until respondent received claimant's attorney's letter on June 28, 2010.

3. If claimant failed to provide timely notice of his alleged accident, was there just cause for that failure?

FINDINGS OF FACT

Claimant had worked as a laborer for respondent for about two years. He testified that he was experiencing pain in his right hand, arm and shoulder beginning about two months before his termination on May 24, 2010. Claimant worked as a laborer performing various jobs, including running a jackhammer, running equipment, carpentry work and other manual labor jobs. Claimant would be picked up for work by a co-worker named Guadalupe Sabas in a company truck.

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[1] *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

Claimant testified that approximately two months before his termination, he began experiencing pain in his right upper extremity, including his right hand, arm and shoulder. Claimant testified that he told Mr. Sabas of the problems and Mr. Sabas told Harold Katz, Jr., respondent's project supervisor. Claimant also alleged that his condition worsened and he advised Mr. Katz of the increased problems. Claimant stated that he continued to perform his job duties until his termination.

Mr. Katz stated that claimant did not tell him of right upper extremity problems and no medical treatment was ever requested. Mr. Katz kept a diary of the workers and their schedules. His diary showed claimant as being a no-show on May 7, 2010, May 17, 2010, and May 22, 2010. Claimant's girlfriend called Mr. Katz on May 18 and stated that claimant was going to the emergency room with stomach pains.

Mr. Katz testified that he had been having problems with the workers missing work due to excessive drinking. On May 15 and May 22, Mr. Sabas appeared at claimant's house to take him to work. However, claimant did not answer the door. After claimant failed to appear at work on May 22, 2010, claimant's employment with respondent was terminated.[2] At no time prior to claimant's termination did claimant advise Mr. Katz that claimant was having any difficulties physically or that he had suffered any work-related injuries.

Mr. Katz testified that respondent posted information on its bulletin board on how to file a workers compensation claim. This information was posted in the job trailer and was in both English and Spanish.

Claimant's Application For Hearing, Form K-WC E-1 (E-1), was filed with the Division of Workers Compensation on June 28, 2010, the same date when respondent acknowledges receipt of claimant's attorney's written claim letter.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

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[2] Claimant was terminated on May 24, 2010.

[3] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[6]

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[7]

At no time was claimant provided authorized medical treatment in this matter. Therefore, the first two criteria contained in K.S.A. 44-508(d) have not been met. Additionally, claimant was not advised in writing by any health care provider that he had been diagnosed with a work-related medical condition. This leaves only the date on which the employee gave written notice to the employer of the injury as a possible date of accident under K.S.A. 44-508(d). That date is June 28, 2010. Pursuant to K.S.A. 44-508(d) the date of accident in this matter would be June 28, 2010. However, the ALJ found the date to be the last day that claimant worked for respondent. While this date would have been proper under the predecessor to K.S.A. 44-508(d), and with earlier case law, it is not a date allowed by this statute.

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts at one time established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation, such as carpal tunnel syndrome. The date of injury for repetitive injuries in Kansas had at one time been determined to be

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[5] K.S.A. 2009 Supp. 44-501(a).

[6] K.S.A. 44-520.

[7] K.S.A. 2009 Supp. 44-508(d).

either the last day worked or the last day before the claimant's job was substantially changed.[8]

The Kansas Supreme Court, in *Mitchell* appeared to resurrect the *Treaster/Kimbrough* last day worked rule when it stated that "Kansas appellate courts have established a bright-line rule for identifying the date of injury in a repetitive, microtrauma situation like carpal tunnel syndrome. The date of injury is the last day worked."[9] If the Court had intended to resurrect that bright line test, then the date of accident in this matter would be, as determined by the ALJ, on May 21, 2010, the last day claimant worked for respondent. And claimant's notice on June 28, 2010, would be untimely.

However, the Kansas Supreme Court answered the apparent confusion with the last-day-worked bright line test in the more recent case of *Saylor.*[10] In *Saylor,* the Court addressed the application of K.S.A. 44-508(d) and the possibility of a date of accident after the last day worked. The Court, in analyzing the legislative history of the statute, determined that the legislature had intended that which was specifically created. The claimant in *Saylor* had last worked on February 6, 2006, but served notice of intent and a written claim on Westar on March 28, 2006. The Court used March 28, 2006 as the date of accident. It also went on to address the confusion created in it's recent decision in *Mitchell*, which discussed the bright line rule and the last day worked language. The Court explained that the *Mitchell* decision did not involve an interpretation of the statutory date-of-accident provisions. Rather, the *Mitchell* matter involved a dispute between two insurers as to which company would pay for a worker's injuries. The dispute questioned whether the injuries involved a single accident or a series of repetitive traumas. The *Saylor* Court went on to state:

> Nevertheless, we clarify here that the judicially created last-day-worked rule is no longer the bright-line rule for determining the date of accident in repetitive trauma cases, but rather the provisions {sic} K.S.A. 2010 Supp. 44-508(d) shall govern wherever applicable.[11]

This Board Member finds that the appropriate date of accident in this matter is June 28, 2010, the day claimant's E-1 was filed with the Division and the day claimant's claim letter was received by respondent. Therefore, claimant's notice to respondent would

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[8] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

[9] *Mitchell*, 291 Kan. 153, Syl. ¶ 5.

[10] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

[11] *Id.* at 621.

be timely. The finding by the ALJ that the date of accident was on May 21, 2010, the last day worked, and that claimant failed to provide timely notice of accident is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered personal injury by a series of accidents, with a date of accident on June 28, 2010. Therefore, notice was timely provided to respondent. The denial of benefits by the ALJ is reversed and the matter remanded to the ALJ for proceedings consistent with this decision.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 21, 2012, is reversed and the matter remanded to the ALJ for further proceedings consistent with the above findings.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[12] K.S.A. 44-534a.